VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 05-34
LAWRENCE ROSENBERGER	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

This grievance is before us on remand from the Vermont Supreme Court pursuant to its decision holding that the Labor Relations Board erred by not allowing the admission of certain evidence in this matter. This grievance originated in 2005 when the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Lawrence Rosenberger ("Grievant") contesting his dismissal as a Game Warden with the State of Vermont Agency of Natural Resources, Department of Fish & Wildlife ("Employer") on account of his actions concerning seeking call-out pay for a March 27, 2005, incident as well as other matters.

Grievant alleged that the Employer violated Article 14 of the Contract by dismissing him. Specifically, Grievant contended that: a) his dismissal was not based in fact or supported by just cause, b) the Employer improperly bypassed progressive discipline, and c) the Employer failed to apply discipline with a view toward uniformity and consistency. Grievant also contended that the Employer's decision to dismiss him constitutes discrimination, retaliation, intimidation and harassment by the Employer in violation of Articles 5 and 15 of the Contract.

On March 30, 2006, the Labor Relations Board issued a Memorandum and Order granting a motion filed by Grievant to exclude evidence to the extent that the Employer may not rely on the following evidence to support disciplinary action taken against

Grievant: 1) evidence of any harmful statements made by Grievant at an April 4, 2005, meeting with Lieutenant Robert Lutz after Lutz asked him if he had responded at all to an injured deer and gone on a call-out on March 27, 2005, as Grievant claimed in his time report; or 2) evidence of admissions made by Grievant concerning the March 27 incident subsequent to the April 4 meeting. The Board reserved judgment on the motion to exclude evidence in all other respects. 28 VLRB 197.

On June 16, 2006, the Board issued Findings of Fact, Opinion and Order on three other motions filed with the Board. The Board granted a Motion to Strike filed by Grievant to the extent that Charges #3 and #5 set forth in the Loudermill letter, which were incorporated into the letter dismissing Grievant, were struck from the dismissal letter. Charge #3 alleged that Grievant violated department policy by going off-duty, self-activating, and charging for a call-out in violation of call-out policy. Charge #5 alleged that Grievant failed to submit a list of witnesses/complainants in an investigation in violation of department policy.

Charge #4 alleged that Grievant failed to submit required reports within 14 days in violation of department policy. To the extent that Charge #4 was not struck from the dismissal letter, the Board denied the motion to strike. The Board also ruled on a Motion to Compel filed by the Employer, and a second Motion to Exclude Evidence filed by Grievant. The Board granted the motions in part and denied them in all other respects. 28 VLRB 284.

The Board held hearings with respect to the remaining charges on August 17, 2006; September 5, 2006; and October 4, 2006; in the Board hearing room in Montpelier before Board Members Edward Zuccaro, Chairperson; Carroll Comstock and Richard

Park. Following the hearings and submission of post-hearing briefs, the Board issued Findings of Fact, Opinion and Order on March 13, 2007. Therein, the Board concluded that just cause did not exist for Grievant's dismissal, and ordered that he be reinstated with back pay.

The Board concluded that the employer had not sustained its burden of proving by a preponderance of the admissible evidence the primary charge that Grievant had fabricated a call-out on March 27, 2005, and falsely obtained call-out compensation. The Board further determined that the Employer violated the provision of the collective bargaining contract concerning uniformity and consistency of discipline by supporting the dismissal on further charges that Grievant had failed to maintain daily logs and failed to file a required report. 29 VLRB 56. In a subsequent decision, issued August 23, 2007, the Board resolved disputes concerning back pay and benefits due Grievant. 29 VLRB 194.

The Employer appealed the Board decision reinstating Grievant and awarding him back pay and benefits to the Vermont Supreme Court. In a February 13, 2009, decision the Court majority determined that the Board abused its discretion by excluding statements and admissions Grievant made at interviews with Lieutenant Kenneth Denton concerning the March 27, 2005, incident, and by not allowing the Employer to examine Grievant at the Board hearing concerning these statements and admissions, or the incident itself. The Court reversed the Board decision reinstating Grievant and awarding him back pay and benefits, and remanded this matter for further proceedings consistent with the Court's decision.

The Board held a hearing on remand on June 29, 2010, before Board Members Edward Zuccaro, Chairperson; Richard Park and James Kiehle. Chairperson Zuccaro and Member Park were on the three member Board panel which initially heard this case along with Member Carroll Comstock. Member Comstock is deceased. Member Kiehle replaced him on the panel on remand. He reviewed the entire record of the original Board proceeding in this matter. Attorney J. Scott Cameron represented Grievant. Assistant Attorney General William Reynolds represented the Employer. The parties filed post-hearing briefs on July 30, 2010.

FINDINGS OF FACT

1. Findings of Fact Nos. 1 through 69 in the March 13, 2007, decision of the Board in this matter are incorporated herein by reference. 29 VLRB at 57 – 82. Findings of Fact Nos. 2 through 16 below supplement and in part repeat Findings of Fact Nos. 20 through 31 contained in the March 13, 2007, Board decision. Id. at 64 – 67.

2. After Grievant completed his regular work shift on March 27, 2005, Easter Sunday, he had an evening meal with his wife and daughter. He then fell asleep on a couch on the first floor of his house sometime before 8 p.m.

3. Grievant's wife went to the second floor of their home at approximately 8 p.m. to get their nine-year old daughter ready for bed, and to read with her before bedtime.

4. Shortly before 8:30 p.m., when Grievant's wife was still upstairs with their daughter, a vehicle entered the driveway of their home. Grievant's wife saw the headlights of the vehicle when it pulled into the driveway. A person exited the vehicle and rang the doorbell of the home. Grievant awoke from his sleep, answered the door and

spoke to the person. Grievant's wife heard voices downstairs, but could not hear the content of the conversation.

5. Grievant subsequently called up the stairs to his wife and told her he would be back shortly. He did not tell his wife where he was going. Grievant left the house and drove away in the truck which the Employer assigned to him as a warden.

6. Before Grievant left his home, he made a call at 8:31 or 8:32 p.m. to the State Police Dispatcher in Williston. The following telephone conversation occurred between Grievant and Williston State Police Dispatcher Still:

Still: Dispatcher S. Still.

Grievant: Hi 945. Would you show me 41, and 76 to an injured deer on the Circ. Complainant is going to be a (Grievant then said a first name which may have been "Gill", or possibly another name but did not appear to be "Joe") Gaudette.

Still: Gill Gaudette?

Grievant: Yup, its in Essex.

Still: Okay, okay.

Grievant: Alright, thanks.

Still: Thank you sir. Bye.

Grievant: Bye.

(State's Exhibits 9, 10; Grievant's Exhibit 31)

7. In making this call, Grievant was identifying himself by his warden number, 945, and using two law enforcement codes, 10-41 and 10-76. Code 10-41 denotes a warden going on duty. Code 10-76 refers to the warden traveling to a particular location. Grievant's reference to the "Circ" in Essex referred to the circumferential highway in Essex, Route 289.

8. The person who came to the door of Grievant's home did not identify himself as "Gill" or "Joe" "Gaudette". Grievant does not know a person named Gill Gaudette. Grievant knows a Joe Gaudette, but Joe Gaudette was not the person who came to the door and Grievant did not believe he was the person at the door.

9. The person who came to the door did not report to Grievant that there was an injured deer or that the deer was on the circumferential highway in Essex. When Grievant left his home on the evening of March 27, he knew there was no reported injured deer on the circumferential highway in Essex or elsewhere. Nonetheless, he did not inform the dispatcher that he had provided erroneous information.

10. When Grievant left his home on the evening of March 27, he was aware that he was not authorized under standard operating procedures to self-activate for overtime to remove a dead deer.

11. At 8:53 p.m., on March 27, Grievant radioed the Williston PSAP. The following radio transmission occurred between Grievant and Dispatcher Still:

Grievant: 945 Williston

Dispatcher: 945.

Grievant: 24, 7750.

Dispatcher: 10-4.

Grievant: The last four?

Dispatcher: By 1566, that's 1566.

(State's Exhibits 9, 10; Grievant's Exhibit 31)

12. Grievant used two additional codes in this second call to the dispatcher: Code 10-24 and Code 7750. Code10-24 denotes that a warden has completed a

previously-reported call for service and is leaving the scene. It does not indicate that a warden is going off-duty. Code 7750 refers to an adult male deer killed by a motor vehicle. When Grievant asked Still for "the last four", he was requesting that the dispatcher provide him with the last four digits of the law incident report generated on the Spillman CAD System that related to the call-out. In providing Grievant with the number 1566, Still was referring to the last four digits of the law incident report that he had created for the call-out.

13. When Grievant left his home, he did not search for a deer, injured or dead. Contrary to his report to the dispatcher, he returned to his home without being at the scene of a dead deer. He also did not search for a dead deer on the following days.

14. Lieutenant Kenneth Denton conducted two tape-recorded interviews in connection with his internal investigation of Grievant for alleged false claiming of call-out compensation for the evening of March 27, 2005. The transcript of the April 14, 2005, interview of Grievant by Lieutenant Denton provides in pertinent part:

> . . .
> Grievant: . . . at some point, will I get to go into detail about this?
>
> Denton: Yes, yes. Would you like to do that now? . . . No go ahead, go into detail on that.
>
> Grievant: Okay, when this first came to my attention obviously was when Bob called this to my attention. When he called this to my attention, he, which added to my confusion this was what he kept referring to Circ Highway in Essex. This call which I will get to was in reference to a deer which was dead on the Belt Line of 127 in Burlington, sometimes referred to as the Circ., The Circ in Essex is commonly referred to as 289 which is in Essex. Conceivably, the Circ could also referred to, eventually they all meet up at 127, but usually the Circ is referred to 289 which is in Essex and the Belt Line is referred to as part of the Circ in Burlington.
>
> Denton: . . .Okay. So in this call that is generated is for?

Grievant: A deer that was dead on the Belt Line in Burlington.

Denton: Okay. So this was a dead deer. How did you get that call?

Grievant: I was, first can I go into, before I get to that, well actually that pretty much covers it, that was my initial confusion. We went through and he kept talking about the Circ and that's why people want to call it the Circ. . . its unusual for me to fall asleep early in the day. I do not need much sleep. I'm up all night type of guy. So I come home take my uniform top off and leave just my pants on and I fell asleep on the couch. For about, I can't recall the time, 8:00 – 8:30, somewhere right around there. Back up just a little bit. Early in the day on Sunday the 27 early that morning I had given a deer to Bob Gaudette. Bob and Joe Gaudette are always bugging me for a deer. Usually I try to give them a couple deer to satisfy them so they would quit calling me, especially Bob, he is always asking for deer. So I give the one to Bob Sunday morning. Well I am asleep on the couch with my work pants on. Boom, boom, boom, knock on the door. Boom, boom again. I go to the door, step down off the steps and he goes "follow me to a deer". I thought it was Bob Gaudette but it turns out it was not. And I am not very happy. I commonly get a lot of people stop by the house. . . I live in Milton close to a huge trailer park. It is kind of a nuisance where a lot of people can get through or whatever. They'll just stop by the house. I get quite a lot of that, so they come by. So I said hold on, I had my pants on and . . . gotten sloppy is typically if I get a call out that's not a violation. Kind of grab my gun belt and go. I had my pants on already so what I did was, I threw my uniform on, I can't recall if I signed on by, I think I signed on by phone. I can't recall specifically. I went outside and talked to this fellow who I think was a Gaudette, I am not positive, I think he told me, well have got a deer on the Belt Line and he told me it was dead.

Denton: Again, that was in Burlington?

Grievant: Yes. So obviously that should have been the end of it. I realize that now, but what I decided to do as I was already dressed, I told him he couldn't have the deer, which was what he wanted, 'cause I was not too happy he woke me up. I decided I would get in my truck, my initial thought through my head what I was going to do, was to shoot up to Sandbar to see what I had for bullhead fishermen just out of curiosity and then go down and grab that deer and then go and drop it off to Gaudette's. So I went up to the Sandbar and went through there and virtually nobody was out, stopped by the refuge and cleaned the back of my truck up and I just kind of spaced it

and I never went down and got the deer. I just drove home. I was almost home, I thought about it and then I will get it in the morning. I kind of spaced getting that deer. I may even went down there and looked for it, once. I called Burlington PD about it and they told me one of their animal control persons had picked up a deer on the Belt Line I think March 30. I coded it out as a 7750 because the guy told me it was a little buck. . .

. . .

Denton: Alright, going back to this initial call on the 27th, okay you provide the dispatcher with the name of the person that had contacted you on this deer.

Grievant: I do not recall doing so. I think the guy was a Gaudette. I don't specifically recall his name. I do not remember who he is.

Denton: Okay. In the log it is entered Gill Gaudette 945 has a 43.

Grievant: Yes, I seen that. I don't know a Gill Gaudette. I don't know if they misunderstood me. I don't recall saying Gill Gaudette.

. . .

Denton: Okay. The information provided to the dispatcher was an injured deer on the circumferential highway. Okay, was that provided by you?

Grievant: Yes.

Denton: Okay, and that was not true

Grievant: No.

Denton: At that time you know it was a dead deer.

Grievant: Initially he come to the door, he wanted, I didn't even ask, he just told me to follow him to a deer. I signed on to get the injured deer on the Belt Line. I don't recall if it was by phone or by radio. Then I went out and ask him and he told me it was dead. And, yuh, right then and there I should have stopped, but I had my uniform on and I . .

Denton: Now, did you sign off with the dispatcher and clear from the call?

Grievant: Pretty certain, yuh.

Denton: Because they have you as completing that call at 21:01 hour. Is that the time you got back home?

Grievant: I think I looked at that and I think they put when I went 24, they put me 42. And then I believe I went 42 again which would be the time I got home. Is that correct?

Denton: That does not show up here. I am going to stop the recording . . . and pull the radio log. Picking up the interview . . . after checking the radio log for that date on March 27 at 9:21 p.m. there is an entry in the radio log showing that Larry went off duty at 9:21. There is also an entry shows him going off duty at 9:01.

Grievant: Dispatcher error.

. . .

Grievant: If I wouldn't . . . of put my uniform on I probably wouldn't have went on that. But, I'd been wanting to check bullhead fisherman . . . I hadn't been able to get out and wanting to get these guys their two deer, these Gaudettes who has been bug the heck out of me. The heck with it, I'm going to go ahead, go ahead and even though I knew the deer was dead.

Denton: Okay, but this second deer though, you have already given one of the Gaudettes a deer that morning.

Grievant: Right, there was a Bobby and Joe Gaudette. I usually give him a deer. I usually bring them to Bob's house and the brothers split him. Its easy to get to because he is right in Milton and I've given these guys deer mainly because they had bug the hell out of me and they don't let up if I don't.

. . .

Denton: . . . you did tell Lt. Lutz that the complainant was Joe Gaudette, right?

Grievant: I don't believe I did. It was a Gaudette but no it wasn't Joe. I know Joe . . .

Denton: So you did not tell him it was Joe Gaudette?

Grievant: I don't have any memory telling him it was Joe Gaudette, it was not Joe Gaudette. . . . I've never told him it was Joe Gaudette, he said to me the complainant was Joe Gaudette. I might have mentioned Joe Gaudette, but I'm pretty sure the guy was a Gaudette. But I know Joe. Joe is short and stocky, Bob is tall and slender. Initially, I thought it was Bob Gaudette. I might have told him that. I don't recall him even asking me who the complainant was. I mean, I have no reason to lie about that. I am admitting the deer was dead and I shouldn't have went.

. . .

Grievant: May I make another statement for the record?

Denton: Sure.

Grievant: I would just like to say that I have been a game warden for almost 18 years. I have never been accused of any wrongdoing in the past by the public or the department, and I have had nothing but good evaluations. I certainly don't want to lose my job over something that I did was so stupid. I realize I screwed up . . . obviously it's a procedural error. If I get, if it's not a violation, the last couple of years, I have gotten kind of sloppy. . . For this particular evening, there was no excuse. I was sound asleep, this person woke me up, and was pissy about it. And I went and threw my uniform on. I went outside, then he told me how the deer was dead. And I already had my uniform on and I was already out there. Like I said, I have been wanting to work nights, see what I had for bullhead fishermen just out of curiosity . . . what is it going to hurt, and so I went on, I went up to Sandbar that evening, and there was nobody out. I stop by the refuge and got the stuff out of the back of my truck . . . it would never happen again. I realize there is going to be punishment out of this, I obviously deserve it. I don't think I deserve loss of my job. I think I have 18 years of very good service. . .

. . .

Denton: . . . On this tape according to Lt. Lutz you state that the complainant is Joe Gaudette and the complaint is in Essex. This is what is on the telephone log.

Grievant: That is obviously a mistake on my part. I actually thought the guy was Bob Gaudette at first and I don't know why I said Essex. I just woke up from a sleeping, deep sleep and the call was in the interval of Route 127. It was not Essex. Why I said Essex on the phone, I don't know. . . Because it was the . . . Belt Line. Misspoken on my part.

. . .

(State's Exhibit 22)

15. The transcript of the May 24, 2005, interview of Grievant by Lieutenant Denton provides in pertinent part:

. . .

Denton: Alright, we just finished reviewing the PSAP tape from Williston and I am asking Larry what the name was that he provided dispatcher on the tape.

Grievant: According to the tape I said Gill Gaudette.

Denton: Okay, Gill Gaudette, it wasn't Joe Gaudette?

Grievant: Correct.

Denton: Okay, because it sounded like the dispatcher said Joe Gaudettte and you said yeah.

. . .

Grievant: According to the tape I can't tell if it says Gill or Joe Gaudette. I do know a Joe Gaudette. But I can tell you the complainant was not a Joe Gaudette.

Denton: Okay. But you do not know why you would have said it was a Gill Gaudette?

Grievant: No. . . If I said Gill Gaudette I do not know a Gill Gaudette. I guess I do not have an answer to that question.

. . .

Denton: Okay, we do not have a Gill Gaudette and you refused to give him the deer. Why would you have done that?

Grievant: I was not happy because he woke me up.

Denton: . . . why would you do that, take that out on the guy, we would normally be glad to give a person a deer that is part of our policy.

Grievant: People react differently. Normally I would have. The reason that I wanted to hold onto that deer is, Joe and Bob Gaudette, those guys, they are not buddies of mine, these guys are nuisances through constantly bothering me for deer . . . that was where that deer was going to go.

Denton: But how come you didn't go get that deer for them if that was a priority for you?

Grievant: I get out and I went out and I checked bullhead fishermen.

Denton: You went in the complete opposite direction of where the complaint was.

Grievant: . . . my intent when I went out was to go get that deer. . . I decided to go check bullhead fishermen . . . was virtually not one out. My intent was . . . to go down Route 2 and turn and go get that deer and I turned on West Milton Road and I was half, three-quarters mile home and I was like, I spaced it and oh hell I will get it

tomorrow. And I just went home and I went and looked for the deer.

Denton: I do not know, before you said you indicated you did not know if you ever went down and looked for the deer.

Grievant: No I didn't. I said that I either went and looked for the deer the next day or the day after. I went and looked for the deer, couldn't find it. . . .

Denton: No, Larry. . . that is not what your testimony was before.

Grievant: I don't know if it was the next day, but I went and looked for the deer, could not find that deer, then I called Burlington Police and asked them, if any reports about a deer on the Intervale and that's where I thought that one you were talking about on the 30th was that particularly.

Denton: So if you called them, that meant you wouldn't have called them until after the 30th, which again this incident occurred on the 27th of March.

Grievant: Correct.

. . .

16. Grievant testified at the June 29, 2010, hearing in this matter that when he left his home on the evening of March 27, 2005, he drove to Sandbar, which is approximately four miles from Grievant's home, to search for bullhead fishermen fishing illegally, and that there was a man and boy fishing there. Grievant did not give this version of events to Denton during the April 14 and May 24, 2005 interviews. Also, there is no corroboration for this version of events testified to by Grievant, and we do not find it credible.

MAJORITY OPINION

Grievant alleges that the Employer violated Article 14 of the Contract by dismissing him. Specifically, Grievant contends that: a) his dismissal was not based in fact or supported by just cause, b) the Employer improperly bypassed progressive

discipline, and c) the Employer failed to apply discipline with a view toward uniformity and consistency. Grievant also contends that the Employer's decision to dismiss him constitutes discrimination against him by the Employer due to his complaint, grievance and union activities in violation of Articles 5 and 15 of the Contract.

In fulfilling our duty of deciding whether just cause exists for an employee's dismissal, the Board has power to police the exercise of discretion by the employer and to keep such action within legal limits.[1] The ultimate criterion of just cause is whether an employer acted reasonably in discharging an employee for misconduct.[2] There are two requisite elements which establish just cause for dismissal: 1) it is reasonable to discharge an employee because of certain conduct, and 2) the employee had fair notice, express or fairly implied, that such conduct would be grounds for discharge.[3]

The burden of proof on all issues of fact required to establish just cause is on the employer, and that burden must be met by a preponderance of the evidence.[4] Once the underlying facts have been proven, we must determine whether the discipline imposed by the employer is reasonable given the proven facts.[5]

In a decision in this matter prior to the initial hearing on the merits, the Board struck two of the five charges that the Employer made against Grievant on the grounds that they were insufficient to put him on notice of the allegations against him.[6] After the initial hearings on the merits, the Board concluded that the Employer had not met its burden of proving that two of the three remaining charges against Grievant – one

[1] In re Goddard, 142 Vt. 437, 444-45 (1983).
[2] In re Grievance of Brooks, 135 Vt. 563, 568 (1977).
[3] Id. In re Grievance of Yashko, 138 Vt. 364 (1980).
[4] Grievance of Colleran and Britt, 6 VLRB 235, 265 (1983).
[5] Id. at 266.
[6] 28 VLRB 284.

involving failure to provide daily reports and the other concerning late filing of a moose report – justified the imposition of discipline.[7] The Employer did not appeal the Board's decisions on these four charges to the Supreme Court.

The remaining charge against Grievant is that he "fabricated a case" on March 27, 2005, "in order to receive call-out compensation". Specifically, the Employer charged that "(t)his misconduct included your willfully making false entries in official records (including your time report, radio log, and Computer Aided Dispatch records), making false statements to a dispatcher, and providing your supervisor with misleading information."

There are a few preliminary issues to be addressed before determining whether the Employer has established this charge against Grievant. Grievant contends that dismissing Grievant for seeking call-out compensation constituted "double jeopardy" as it was an improper increase in punishment. Grievant asserts that, when his supervisor Robert Lutz, struck the March 27 call-out from his time sheet a week later and told him the issue was closed, this was an appropriate exercise of corrective/disciplinary action. The Employer's subsequent decision to dismiss him for seeking call-out compensation, Grievant maintains, constituted an improper increase in punishment.

"Double jeopardy" involves receiving a double penalty for the same offense. The Board has indicated that, if an employee was disciplined and then subsequently dismissed for the same offense, the Board would conclude that the employee received an improper increase in punishment.[8] We are not persuaded by Grievant's claim of a double penalty. The actions by Lutz did not constitute imposition of discipline. The forms of discipline

[7] 29 VLRB 56.
[8] Grievance of Johnson, 9 VLRB 94, 111 (1986).

set forth in Article 14, Section 1, of the Contract are: 1) oral reprimand, 2) written reprimand, 3) suspension, and 4) dismissal. Lutz did not indicate to Grievant that he was imposing the disciplinary action of a reprimand on him. Lutz simply informed Grievant that he would not be paid for the call-out and struck the call-out from Grievant's time report. Since Lutz did not discipline Grievant for seeking call-out compensation, the Employer did not impose an improper increase in discipline on Grievant by subsequently dismissing him.

We recognize that Lutz told Grievant that the issue concerning the March 27 call-out was a "done deal" and that he would not report the issue to the chain of command. That same day, Lutz acted contrary to this representation to Grievant by reporting the issue to his superiors. Nonetheless, this does not affect the validity of the Employer's subsequent decision to dismiss Grievant. Article 14, Section 2, of the Contract provides that dismissal of an employee may be taken by "(t)he appointing authority or designated representative". Lutz, as a first-line supervisor, had no authority to determine whether to dismiss Grievant for the claimed March 27 call-out. Since Lutz did not impose discipline on Grievant for seeking call-out compensation and had no authority to determine whether he should be dismissed, the Employer was not bound by the representations Lutz made to Grievant. It is understandable that Grievant was upset by the turn of events after the representation made to him by Lutz, but the Employer was not precluded from subsequently dismissing him as a result of the claimed call-out.

The other preliminary issue is to address Grievant's contention that, since the charge against him alleges a type of fraud – i.e., fabrication of a call-out – the Employer has the burden to prove this charge by clear and convincing evidence. We disagree. The

Vermont Supreme Court has held that the burden of proof in a dismissal case is met by the usual civil case standard of a preponderance of the evidence.[9] This has been the standard consistently applied by the Board in dismissal cases.[10]

We turn to addressing whether the Employer established the charge that Grievant fabricated a case on March 27, 2005, in order to receive call-out compensation. We conclude that the Employer has established this charge by a preponderance of the evidence.

Grievant was not credible in setting forth his version of events on the evening of March 27. Grievant informed the dispatcher that evening that a complainant by the name of "Gill" or "Joe" "Gaudette" reported an injured deer on the circumferential highway in Essex. However, Grievant did not provide a satisfactory explanation or corroborating evidence supporting a claim that a person by this name came to the door of Grievant's home that evening, and we have found that the person who came to his home did not identify himself as Gill or Joe Gaudette. The testimony of Grievant's wife, which we have accepted, did no more than support his assertion that someone came to the door. This was wholly insufficient to corroborate the balance of Grievant's version of the events of the evening.

Further, the person who came to the door did not report to Grievant that there was an injured deer or that the deer was on the circumferential highway in Essex. When Grievant left his home on the evening of March 27, he knew there was no reported injured deer on the circumferential highway in Essex or elsewhere.

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[9] Grievance of Muzzy, 141 Vt. 463, 472 (1982).
[10] *See* e.g., Grievance of Bishop, 5 VLRB 347, 367-68 (1982); *Affirmed on other grounds*, 147 Vt. 280 (1986).

Grievant claims that when he left his home that evening he had received information from the person who came to his door clarifying that there was not an injured deer in Essex, but instead a dead deer in Burlington. We do not find this credible. First, despite this alleged clarifying information, he did not inform the dispatcher that he had provided erroneous information concerning an injured deer in Essex. Second, when Grievant left his home, he was aware that he was not authorized under standard operating procedures to self-activate for overtime to remove a dead deer, yet he claims that he did so anyway. Third, the evidence indicates that Grievant did not search for a deer that evening, or the following days, despite the alleged complaint which he received. There is no corroborating evidence of a dead deer in Burlington during this time.

Grievant also reported to the dispatcher that evening that he was leaving the scene of an adult male deer killed by a motor vehicle. However, as discussed above, when Grievant left his home, he did hot search for a deer. Contrary to his report to the dispatcher, he returned to his home that evening without being at the scene of a dead deer.

Grievant also claims that, when he left his home that evening, he drove to Sandbar to search for bullhead fishermen, and there was a man and a boy fishing there. Grievant did not give this version of events to the investigator of the charge against him. Also, there is no corroboration of this version of events, and we do not find it credible.

In sum, there were several instances of Grievant reporting false information to the dispatcher on the evening of March 27, and he did not correct the information even though he knew it was false and he had the opportunity to do so. Also, there was no corroborating evidence to support his claims of: 1) a complainant that evening, 2) a dead

deer, and 3) a man and boy fishing at Sandbar. Grievant's claims are not credible. Grievant' dishonesty culminated in submitting a time sheet claiming call-out compensation for the evening of March 27. Also, in considering the evidence presented at the hearing on remand as well as the evidence presented during the initial merit hearings, we conclude that the Employer has established by a preponderance of the evidence that Grievant misled his supervisor, Robert Lutz, on April 4, 2005, when discussing with him what occurred on the evening of March 27. We conclude that the Employer established the charge that Grievant fabricated a case on March 27, 2005, in order to receive call-out compensation.

The Employer has established the fabrication charge against Grievant, but has not established the other charges it made against him in support of his dismissal. The fact that all of the charges against Grievant have not been proven in their entirety does not necessarily mean that his dismissal was without just cause. Failure of an employer to prove by a preponderance of the evidence all the particulars of a dismissal letter does not require reversal of a dismissal action.[11] In such cases, the Board must determine whether the proven charges justify the penalty.[12]

We look to the factors articulated in Colleran and Britt to determine whether the Employer exercised its discretion within tolerable limits of reasonableness.[13] The pertinent factors here are: 1) the nature and seriousness of the offense and its relation to Grievant's duties and position, 2) the clarity with which Grievant was on notice that his offense was prohibited, 3) the effect of the offense on supervisors' confidence in Grievant's ability to perform assigned duties, 4) Grievant's past disciplinary record, 5)

[11] Grievance of McCort, 16 VLRB 70, 121 (1993).
[12] Id.
[13] 6 VLRB at 268-69.

Grievant's past work record including length of service and performance on the job, 6) the consistency of the penalty with those imposed upon other employees for the same or similar offenses, 7) mitigating circumstances surrounding the offense, 8) the potential for Grievant's rehabilitation, and 9) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

Grievant's offense is very serious, particularly in the case of a law enforcement officer. Grievant engaged in repeated dishonesty to justify claiming call-out compensation to which he was not entitled. Dishonesty by employees is grounds for serious punishment, and dismissals for dishonesty have been upheld in several cases by the Board and the Vermont Supreme Court.[14] The nature of a law enforcement officer's duties requires accurate and truthful reporting of events, including providing testimony in forums where credibility is crucial. Grievant acted contrary to these duties by his repeated dishonesty.[15]

Grievant was on fair notice that his dishonesty could be a cause for dismissal. Honesty is an implicit duty of every employee, and Grievant knew that dishonest conduct was prohibited.[16] Grievant's misconduct understandably resulted in his superiors losing confidence in his ability to perform assigned duties. Grievant's dishonesty undermined his ability to function as a law enforcement officer and maintain the trust of his superiors.

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[14] Grievance of Turcotte, 30 VLRB 24 (2008). Grievance of Kerr, 28 VLRB 264 (2006). Grievance of Ducas, 28 VLRB 238 (2006). Appeal of Danforth, 27 VLRB 153 (2004). Grievance of Westbrook, 25 VLRB 232 (2002). Grievances of Camley, et al, 24 VLRB 119 (2001). Grievance of Newton, 23 VLRB 172 (2000). Grievance of Corrow, 23 VLRB 101 (2000). Grievance of Pretty, 23 VLRB 260 (1999). Grievance of Coffin, 20 VLRB 143 (1997). Grievance of Graves, 7 VLRB 193 (1984); *Affirmed*, 147 Vt. 519 (1986). Grievance of Cruz, 6 VLRB 295 (1983). Grievance of Barre, 5 VLRB 10 (1982). Grievance of Carlson, 140 Vt. 555 (1982).

[15] Danforth, 27 VLRB at 163.

[16] Carlson, 140 Vt. at 560.

Nonetheless, Grievant contends that the penalty imposed on him was not consistent with penalties imposed on other wardens for the same or similar offenses, and that he was discriminated against for his VSEA and Wardens Association activities and criticism of his superiors. The Employer is required under Article 14(1)(b) of the Contract to apply discipline "with a view toward uniformity and consistency". In applying this factor, "(a)s a general rule, the State should treat like cases alike".[17] Grievant must present evidence that other employees committed similar offenses and received less or no discipline to demonstrate a violation of this contract provision.[18]

Grievant has failed to present specific evidence indicating that he was treated differently than other employees committing similar offenses. The evidence indicated that certain call-outs claimed by some wardens other than Grievant did not meet call-out requirements, and that Grievant's superiors responded by striking these call-outs from the wardens' time reports rather than disciplining the wardens.[19] However, we do not have specific evidence on the details of these claimed call-outs to conclude that they involved similar circumstances to the events leading to the dismissal of Grievant – i.e., several instances of providing false information to a dispatcher and thereafter claiming call-out compensation for work which had not been performed. The evidence is insufficient to conclude that the contract provision on consistency of discipline was violated.

Grievant contends that the culture within the Department of Fish and Wildlife is not one of rigid adherence to standard operating procedures, protocol and rules and regulations. Grievant presents as an example of this culture an incident where wardens

[17] In re Towle, 164 Vt. 145, 151 (1995).
[18] In re Jewett, Sup.Ct.Dock.No. 2008-138, 2009 VT 67 (June 19, 2009).
[19] 29 VLRB at 81-82, Finding of Fact No. 67.

were allowed during working hours to fish and clean fish to be served at a meeting of wardens.[20] We do not condone such activities, but they are not similar offenses to that committed by Grievant.

Grievant contends that prior complaints to and criticism of his superiors, and his activities as an officer of the Wardens Association and a member of the Vermont State Employees' Association negotiation team, were motivating factors in the Employer's decision to dismiss Grievant. In cases where employees claim management took action against them for engaging in protected activities, the Board employs the analysis used by the United States Supreme Court: once the employee has demonstrated his or her conduct was protected, she or he must then show the conduct was a motivating factor in the decision to take action against him or her. Then the burden shifts to the employer to show by a preponderance of the evidence it would have taken the same action even in the absence of the protected conduct.[21]

The factors which we consider in determining whether protected activity was a motivating factor in an employer's decision to take adverse action against an employee are:

- whether the employer knew of the employee's protected activities;
- whether the timing of the adverse action was suspect;
- whether there was a climate of coercion;
- whether the employer gave as a reason for the decision protected activities;

[20] 29 VLRB at 82, Finding of Fact No. 68-69.
[21] Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977).Grievance of Sypher, 5 VLRB 102 (1982). Grievance of Cronin, 6 VLRB 37 (1983). Grievance of Danforth, 22 VLRB 220 (1999), *Affirmed*, 172 Vt. 530 (2001). Grievances of Cray, 25 VLRB 194 (2002); *Affirmed*, Sup.Ct. Dock. No. 2002-538 (November 6, 2003).

- whether an employer interrogated the employee about protected activities;
- whether the employer discriminated between employees engaged in protected activities and employees not so engaged; and
- whether the employer warned the employee not to engage in protected activities.[22]

In general, an adverse employment decision following engaging in protected activity is not legally suspicious on its own.[23] There must be some facts other than chronology alone to suggest that the timing of the employer's decision was suspicious.[24]

A climate of coercion is one in which the employer's "conduct may reasonably be said to have a tendency to interfere with the free exercise of employee rights".[25] Also, the presence of improper employer motivation need not be shown by direct evidence. An employer's unlawful motive may be inferred from the circumstances where no direct evidence of the employer's intent exists in the record.[26]

In applying these standards here, we conclude that Grievant has not demonstrated that his protected activities were a motivating factor in the Employer's decision to dismiss him. The Employer was aware of Grievant's protected activities, which continued up to the time that he was dismissed. However, Grievant has not presented other facts to suggest that the timing of the Employer's decision was suspicious. Grievant did not demonstrate that a climate of coercion existed. There is no evidence of statements made to Grievant by his superiors to indicate that his protected activities were held

[22] Sypher, 5 VLRB at 131.
[23] In re Grievance of Rosenberg and Vermont State Colleges Faculty Federation, AFT, UPV, Local 3180, AFL-CIO, 176 Vt. 641 (2004).
[24] Id.
[25] Grievances of McCort, (Unpublished decision, Supreme Court Docket No. 93-237, 1994).
[26] Kelly v. The Day Care Ctr., Inc., 141 Vt. 608, 613 (1982).

against him. Grievant has not presented specific evidence demonstrating that he was treated differently than employees not engaged in protected activities. In short, Grievant has not shown that the Employer had an unlawful motive in dismissing him.

In ultimately determining whether the Employer acted reasonably in dismissing Grievant, we recognize that Grievant had a good work record over 18 years of service and previously had not received disciplinary action. However, the serious nature of his misconduct, taken together with lack of specific evidence indicating that he was treated differently than other employees committing similar offenses, warranted bypassing progressive discipline and imposing dismissal. The Employer acted reasonably in concluding that Grievant was not a good candidate for rehabilitation and that a sanction less than dismissal would not have been adequate. Grievant exhibited repeated dishonesty on the evening of March 27, 2005, as well as on subsequent occasions prior to his dismissal in connection with his fabricated claim for call-out compensation. This justified the Employer concluding that his potential for rehabilitation was not promising. In sum, we conclude that just cause existed for Grievant's dismissal.

/s/ Edward R. Zuccaro

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Edward R. Zuccaro, Chairperson

/s/ Richard W. Park

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Richard W. Park

CONCURRING OPINION

I concur with the majority that the dismissal of Grievant is justified, and thus join in the ultimate decision to dismiss this grievance. However, I write this concurring

opinion because I have a somewhat different view of the facts than my colleagues and also would like to express concerns with the way the Employer proceeded in this matter.

I credit Grievant's version of events on the evening of March 27, 2005, more than my colleagues. Grievant was roused from his sleep that evening by a person identifying himself as "Gill". Grievant believed based on his initial conversation with Gill that there was an injured deer on the "circ", which Grievant understood to be the partially completed circumferential highway in Essex. Grievant then made a call to the State Police Dispatcher in Williston indicating that he was going on duty to travel to the "circ" in Essex to deal with an injured deer.

After calling the dispatcher, putting on his uniform, and telling his wife that he was going out on a call, Grievant went back to speak with Gill. It was then that he learned that the deer was dead and that it had been hit on the "circ" in Burlington, not Essex. Although Grievant knew that he was not authorized to self-activate for a call-out based on a report of a dead deer, Grievant decided to remain on duty. Grievant then determined that he would check on bullhead fishermen fishing illegally before picking up the dead deer. Grievant went looking for bullhead fishermen at the Sandbar but only saw one adult, accompanied by his son, fishing. He then went to the Department of Fish and Wildlife refuge to clean out his truck to "kill time" before checking again for fishermen. He found none when he returned to Sandbar. He then proceeded in the direction of picking up the dead deer, but "spaced out" while driving, and turned onto his road and headed home instead of locating and picking up the dead deer before returning home.

In sum, this was not a situation where Grievant developed a plan to intentionally fabricate a callout to improperly receive overtime compensation. Instead, he went on duty

the evening of March 27, 2005, with the understanding that he was going to locate, and tend to, an injured deer on highway in Essex. At this point, he was operating according to proper call-out procedures. Thus, he engaged in no misconduct based on his initial call to the dispatcher going on duty.

However, after making this call, Grievant did engage in actions supporting the charge made by the Employer that his "misconduct included your willfully making false entries in official record (including your time report, radio log, and Computer Aided Dispatch record), making false statements to a dispatcher, and providing your supervisor with misleading information." He received information from Gill that there was not an injured deer in Essex, but instead a dead deer in Burlington. Yet, he did not inform the dispatcher that he earlier had provided erroneous information.

Also, Grievant was aware when he left his home that he was not authorized under standard operating procedures to self-activate for overtime to remove a dead deer, yet he did so anyway. Further, Grievant reported to the dispatcher after leaving his home that he was leaving the scene of an adult male deer killed by a motor vehicle. Contrary to his report to the dispatcher, he returned to his home that evening without being at the scene of a dead deer. Grievant's dishonesty culminated in submitting a time sheet claiming call-out compensation for the evening of March 27. In considering all the evidence presented in this case, I also concur with my colleagues that Grievant misled his supervisor, Robert Lutz, on April 4, 2005, when discussing with him what occurred on the evening of March 27.

Grievant's misconduct warranted the Employer imposing discipline on him, but I am troubled with the way the Employer proceeded in investigating Grievant's actions.

Lutz, after informing Grievant during their April 4 meeting that that he would not be paid for the March 27 call-out, told Grievant that the issue concerning the call-out was a "done deal" and that he would not report the issue to the chain of command. Despite these representations by Lutz, a week later Grievant was required to turn in his truck, badge, computer and firearm pending an investigation of him for misconduct. This was an inappropriate way to deal with an 18 year employee with no previous discipline and a strong performance record. Although I agree with my colleagues that Grievant has not demonstrated that his prior complaints and criticisms of his supervisors, and his activities with the Wardens Association and the Vermont State Employees' Association, were a motivating factor in the Employer's decision to dismiss him, the Employer could have acted in a manner more respectful of a long-time employee who had provided good service.

Nonetheless, I ultimately concur with my colleagues that the serious nature of Grievant's misconduct, taken together with lack of specific evidence indicating that he was treated differently than other employees committing similar offenses, warranted bypassing progressive discipline and imposing dismissal. The Employer acted reasonably in concluding that just cause existed for Grievant's dismissal.

/s/ James C. Kiehle

James C. Kiehle

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Grievance of Lawrence Rosenberger is dismissed.

Dated this 18th day of November, 2010, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Edward R. Zuccaro

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Edward R. Zuccaro, Chairperson

/s/ Richard W. Park

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Richard W. Park

/s/ James C. Kiehle

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James C. Kiehle